The "reverse sequence" in civil liberties

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For a number of years I belonged to the American Civil Liberties Union. To me this membership was part of a commitment to perfecting American democracy. I became a political scientist for the same reason. The two commitments, American patriotism and democratic values, went together. By improving the one—the procedures for participation in political life through protection of individual liberty—the other, America as a force for freedom at home and in the world, would also be enhanced. The combination of a strong national defense, social welfare programs, and civil liberties, as exemplified in the 1940s and 1950s by the New York State Liberal Party (in whose youth division I was active) seemed mutually reinforcing. But that combination, however comforting it seemed in the Eisenhower years, was not to last long.

In the early sixties, while teaching politics at Oberlin College in Ohio, I served for a couple of years on the executive committee of the local ACLU. It was not easy, given our interest in procedures per se, to find violations of proper practice in a liberal arts college town. By moving a few miles away, however, we could come up with a couple of cases of unreasonable search or a few days of possibly unlawful detention. In retrospect, it was an innocent time and I know now, from having read William A. Donahue's The Politics of the ACLU that it was, for me at least, a time of naivete as well.

This essay is a revised version of the introduction to William A. Donahue's The Politics of the ACLU (Transaction Press).
The ACLU was never what I thought it was, an organization standing up for people whose civil liberties were threatened by the passions of the time. The ACLU has always been what Donahue says it is—an organization committed to a shifting agenda of substantive policy change as dictated by the political perspectives of its most active members.

Nor was the ACLU what its "purist" members thought: to refer back to its name, a union of people concerned primarily with civil liberties. Whether it was support for unions in the 1920s and 1930s, the New Deal/Fair Deal social welfare agenda of the 1940s and 1950s, or its devotion to equal outcomes since the 1960s, the ACLU has viewed civil liberties, so Donahue shows, as instrumental to other purposes.

Starting somewhere in the mid-1960s, it became apparent to me that I was out of sympathy with the ACLU. Either it had changed, as I then thought, or I had changed, or both. Saddened by the loss of a sympathetic association, and even, to an extent, a source of identity, I wondered what had happened to it or to me.

To say that organizations must adapt to a changing environment is a cliche. The ACLU is anomalous only in that it is such a classic example of the very spirit—absorption into the dominant values of the time—that the naive like myself once thought it was supposed to counter in favor of eternal verities.

When a group organizes to make demands on government to support the group's economic self-interest, no one is surprised that organizational doctrines change as a means of securing the substantive end of increasing its income. That large oil companies should favor market forces when these produce high prices, and governmental allocation when gluts produce low prices, raises few eyebrows. For organizations like the March of Dimes to seek new diseases to conquer after polio declined, has been a subject of mild amusement. For the ACLU radically to reorient its position on fundamental issues decade-by-decade, so that there is little relationship between what it said 50 years ago and what it says today, is more surprising. Yet this is exactly what has happened.

Quotas, anathema in the past, now have become desirable as a form of positive discrimination. (Who remembers when the ACLU taught that the Constitution was color blind?) Balancing competing values—order in society with the rights of the accused—has given way to attacks upon authority. ("Lawlessness," the ACLU now says, "is a direct consequence of the failure of the community.") In briefest compass, the ACLU, once devoted to achieving individual free-
dom from government restraint, has become a convert to advocacy of governmental compulsion to achieve equality of condition. From defense of individual differences against government, the ACLU has moved to diminish differences among people—white and black, rich and poor, young and old, authority and citizen, parent and child—the list grows all the time.

Just as the ACLU identified itself with industrial unionization in earlier times, it has in recent years become part of the civil rights movement, the women's movement, and the movement against "ageism" and other "isms" devoted to diminishing inequalities in American life. There has been no conspiracy. No one pushed me out to put the present participants in. Two things happened concurrently: Activists in these other movements moved into the ACLU, and people discomforted by this trend toward support of equal results moved out. The process is self-reinforcing: New policies attract more like-minded adherents. No one has to tell the ACLU membership what to do. They can guess what equality of condition requires, and trial and error tells them what catches on with the people who flock to their cause. What is behind this reversal of values and practices?

The "original sequence"

Americans are able to agree about the desirability of equality because they mean different things by it. Equality before the law (or equal rights) signifies that people in similar positions will have similar legal standing, so that administrative and judicial decisions will be uniform and predictable. Equality of opportunity signifies the ability to enter contests of various kinds and to keep the proceeds, providing only that one does not prevent others from trying. Equality of condition (or outcome, or result) means that the resources possessed by individuals and groups in society should be roughly equivalent. Rights, opportunity, and outcomes are worlds apart, so distant in practice that it has proved expedient for many to deny the full extent of the differences.

The much-remarked unideological, or better still, a-ideological character of American political history may be attributed to the denial of these differences. Rather than admit that more of one meant less of another, it has been the special bent of American political thought to claim just the opposite: More of one kind of equality would also lead to more of another. Equality before the law, secured by such devices as extension of the franchise and a Bill of Rights providing procedural guarantees, would help secure opportunity to
participate in political and economic life. And genuine equality of opportunity, by preventing government from introducing unnatural inequalities into American life, would produce as much equality of condition as is compatible with the innate or behavioral differences among people or as is necessary to preserve republican government.

American exceptionalism is not just the absence of hereditary hierarchies, though that was (and still is) important. What was truly distinctive, in that it was not found elsewhere, was the belief that equality of opportunity, properly pursued, would lead inexorably to equality of condition. Believing people to have moderately equivalent skills and observing that social and economic conditions were far more egalitarian than in Europe, early Americans thought that competition would increase or maintain whatever equality there was; inequality could not come out of competition, unless, as the Jacksonians feared, government introduced banks, charters, franchises, and other privileges not equally available to all citizens.

Observe the initial sequence of relationships among ideas about equality. They run from equality before the law, to equality of opportunity, and only then to equality of results. Of course, the prospects for republican government were related to the relative equality of condition fostered by American circumstances. America was blessed. In order, as the Declaration put it, to secure these blessings for posterity, this God-given equality was not to be decreased by the kind of distant central executive against which the colonies had so recently rebelled.

Insofar as inequality of condition resulted from differences in the faculty of individuals (but only to this extent, and no further), this was tolerable, expected, and natural, if not entirely desirable. In no way did the varying aptitudes for acquiring property (then considered an attribute or extension of the individual person) seem to threaten self-government. The battles of the party-of-the-country against the party-of-the-king in England were appropriated by the American branch of the British Whig opposition. Without an American equivalent of the King's men in parliament—the hated placemen put there by royal patronage, including the venal sale of offices—neither the English monarch nor his American successors could maintain their preponderance of power. Once these special privileges (the anti-federalists especially feared holders of national debt) were removed, equality before the law would help secure the equality of opportunity that kept sufficient equality of condition so that republican government could thrive.
As soon as it is understood that the historic source of inequality was found in central governments ruled by strong central executives, there need be no puzzle over the lack of a socialist party in America. The stronger the central government—in this time-bound equation, good at least until the Civil War—the weaker are individual liberties. After the revolution was won and its posterity assured by Jacksonian democracy, the United States of America and its Constitution became the exemplar of good (i.e., reasonably egalitarian) social relations. The flag, and hence the social relations for which it stood, was worth defending. Satisfaction with the circumstances of American life reinforced the original sequence. Inequality of condition could be bracketed-off and accepted, provided that legal and political equality were achieved. In this way a separate and protected preserve for civil liberties could be carved out. Of course there was nothing like universal agreement on civil liberties, but those who thought of themselves as civil libertarians could reflect a simultaneous satisfaction with conditions in general and dissatisfaction with flat-out violations of legal and political rights.

The sequence reversed

But the original sequence—in which equality before the law helps secure equality of opportunity and both, taken together, prevent such gross disparities of condition as to render republican government suspect—was based on assumptions subject to the ravages of time. The rise of corporate capitalism after the Civil War strained the social fabric. Yet populists could not quite bring themselves to turn against their Jeffersonian and Jacksonian forebears by embracing big government as the antidote to big corporations. Eventually populists merged into the progressive movement, which sought regulation to restore equality of opportunity to the conditions of competition in the face of inequalities fostered by giant capital. It took the great depression and the civil rights movement to raise (and, for some, to answer affirmatively) the question of whether the original sequence needed reversal.

It is the reverse sequence (to use a dramatic term from a quite different field) that characterized the ACLU world view. Increasingly, unceasingly, equality of condition was viewed as a precondition of equality of opportunity.

Driving home the proposition that the most widely espoused principles—equality before the law and equality of opportunity—had been denied to black citizens, i.e., that the powers that be had not followed their own announced beliefs, the civil rights move-
ment legitimated much that it touched, including a focus on group as distinct from individual rights. When a number of its leaders came to believe that equal opportunity would, in their circumstances, lead inexorably to inequality of results, they began to seek policies enforcing equality of condition on a group basis. Their position deserves elucidation.

Under their formulation, equal opportunity may promote inequality of outcomes for individuals but not for groups. Their objective is not to alter the range of inequality of results among individuals, they say, but to assure that the same distribution of inequality of results obtains across all relevant groups—whatever that range may be. Therefore, to them, a rough group parity of outcomes is a reasonable measure of the actual degree of equality of opportunity that exists. Thus they argue that no group as such (because it is that group) should be denied significant shares of equal opportunity, measured by equal outcomes compared to other groups. Whether those who hold these views, once group differences narrowed, would accept unequal outcomes for individuals within them, I cannot say.

For others, of course, the present range of unequal outcomes (among both groups and individuals) is too high, and their goal is to narrow the range. It is this view, embodied in the reverse sequence, that I believe currently characterizes ACLU action. Without equality of resources, it was argued, competition for the good things of life was prejudged in favor of those who had more and against those who had less. In order to do better, one had to be pre-endowed with the results of already having done better. Hence positive discrimination. What is more, without this substantive equality, the lack of equal opportunity would mean a denial of equality before the law. The opportunities that equal rights had been thought essential to maintain (for those who had them) or achieve (for those who didn’t) instead became the prerequisite. Civil liberties had been turned upside down. The causes—equal rights and equal opportunity—had become the consequences of equal results. What had been widely agreed—the indispensability of equal rights as a precondition of equal opportunity—was replaced in importance by what had been problematic—securing equal outcomes.

Liberalism and civil liberties

To this very day, the profound consequences of adopting the reverse sequence remain for those who regard themselves as civil libertarians. The spoken premise had been that people who disagreed about policy outcomes could still agree on process and proce-
dure. The American political system, it was widely held, was legitimated by agreement that its processes accorded with equality before the law, which nurtured equality of political opportunity. Even if mass attitudes did not always favor the Bill of Rights, elites, despite policy differences, would rally around these procedural guarantees. Exceptions, such as denial of the franchise to black people, were numbered among faults to be corrected; and they were thought to be exceptions, not the rule. Had this not been so, it would not have been possible to distinguish civil libertarians from other people who differed about the role of government or the kinds of policies it should pursue. The reverse sequence not only sought to diminish differences among Americans in general, it also obliterated the rationale for distinguishing a particular kind of American, a civil libertarian, from any other political actor.

Now we know from casual observation, as William Donahue has shown in detail, that most members of the ACLU were politically liberal as well. In the era after World War II, this meant that they (I would then have said "we") favored governmental action to improve the economic conditions of poor people and the political opportunities of racial minorities. Insofar as the reverse sequence meant adopting the liberal welfare program, it may have been uncomfortable for economic conservatives, but not for those who agreed with the substance. (Allowing substance to mask principle was a mistake, but it is not easy for people to see a threat lurking behind those who agree with them on policy.) If the ACLU was becoming more liberal, it must be because liberals cared more than conservatives about the people being hurt—or so I thought in the early 1960s.

In the 1970s, another consequence of adopting the reverse sequence emerged, this one harder to deny. The very government that was urged to achieve greater equality of results was also, by virtue of being in authority, responsible for keeping the deprived down. What else but "the system" (i.e., established authority) denied poor people, racial minorities, and women the equal rights and opportunity that could be enjoyed only by first achieving equality of condition? The disposition to blame the system led to an anti-authority position. This explains why, amidst an epidemic of strong-arm crime, the ACLU fought to make arrest, detention, and conviction more difficult.

At one and the same time, therefore, the ACLU, responding to the reverse sequence, favored stronger governmental action to reduce inequality while simultaneously attacking government's authority. A long-overdue appreciation of this no-win situation—government
in America damned if it did and damned if it didn’t—led to my unwillingness to renew my membership.

I do not mean to say that those who were out of sympathy did not change at all, and that the ACLU did all the changing. We have less reason to cry foul than I once thought. For one thing, those who joined the organization in the 1950s became active during an aberrant period. The patriotism fostered by the war against fascism created common ground that gave way when the enemy stood for something other than gross racial, religious, political, and economic inequality. During the conservative Eisenhower era, widespread antipathy to Communism and the Communist party made it unsafe to leap to their defense. Faced with a bipartisan consensus on security matters, the ACLU ducked difficult issues, not least by bargaining with J. Edgar Hoover, head of the Federal Bureau of Investigation. Of this, the membership knew nothing. What it did know was that in those days the ACLU concentrated almost entirely on procedural rights. Criticism and patriotism still seemed compatible. But the decades before and after this period—when, by default, means were more important than ends—were times in which the reverse was more nearly true—policy ends mattered more than procedural means.

Those of us who felt aggrieved at having our ACLU taken from us were too self-satisfied by far. Since we believed in the pure civil liberties project, and those who displaced us did not, we identified ourselves as the long-suffering adherents of the original creed. So far as it went, that was true enough. But we did not understand at that time (certainly I did not) that the initial sequence reflected a set of preferences about how American society should be organized. We were (and are) no more neutral in our views than current ACLU adherents; the difference (and it is profound) is that what they take for granted—the desirability of equal results, even at some sacrifice of equal rights—is problematic for us, and what we assume—the desirability of equal rights and opportunity, even if inequalities do not thereby decline—has become problematic for them. The separation of legal rights from the maelstrom of social life, which in our own eyes makes us true-blue civil libertarians, makes us in their eyes apologists for unconscionable inequalities. And that (leaving out the "unconscionable") is what is in dispute.

Guilty as charged! Some of us discover that we approve of many aspects of traditional morality and, therefore, of the social hierarchy from which it stems. Acceptance of a modicum of hierarchy, moreover, includes respect for authority as well as other forms of
inequality. Others among us 1940s and 1950s civil libertarians discovered that if we wanted the creativity and spontaneity of market forces, we had to accept the inequality (as well as the vulgarity) that went with it. Had we believed that the combination of hierarchy and market relationships that constitutes whatever established authority remains in American life was vicious—leading to cumulative inequalities threatening American democracy along with its civil liberties—we, too, might have considered equality before the law as an epiphenomenon and equality of condition as all that was worth fighting for.

When the ACLU accepted the reverse sequence (some time in the late 1960s or mid-1970s) it also rejected the insulation of law and opportunity from condition. From then on equality of condition was primary and equality before the law secondary.

**The ACLU's future**

The ACLU has become an adjunct of movements to attack existing authority in the name of equality. If these movements weaken, the ACLU, if its past is any guide to its future, will abandon the reverse sequence and retreat to delineating a privileged position for legal rights. Should these egalitarian movements grow stronger, the ACLU may well become absorbed into them, making manifest what is now latent, namely, its service as their legal arm. Whatever happens, the experience of the ACLU will have taught us something about the conditions for treating civil liberties as an end in itself.

One such condition occurs when civil libertarians are numerous enough to band together, but still so weak as a group as to require tolerance from dominant social forces. Rather than fight losing battles over the substance of policy, this civil liberties group seeks to separate itself and its issues from substantive outcomes. The stance is tactical: The emphasis is on procedures because the group is sure to lose on policy. Once the group is strong enough to enter contests over policy, civil liberties become the means to more important ends. Those who disagree on substance leave the organization; gradually, the end goals overwhelm the former (and expedient) concentration on the means, and the initial sequence gives way to the reverse sequence.

Are there, then, no social conditions that would sustain disagreement over substance in the midst of agreement over procedures? Yes, but these conditions are delicate in that they require a certain kind of balance among forces. There must be people favoring hierarchy, for without hierarchy there is no place for legal rights,
universalistic rules, adjudication of who has the right to do what, or predictable responses from government. And to some degree there must be pro-market forces. Without them there would be no one who believed in competition for its own sake. And without people to safeguard the right to switch support, there could be no change in political office. Egalitarians are needed, also, to keep differences—including those between authority and citizen—from growing too large. Otherwise, hierarchies might seek to throttle competition and capitalists to control markets, making it difficult for newcomers to enter. Should any of these social orders grow too powerful (the danger of which Aristotle was well aware), procedural rights would be nullified. Hierarchy might stifle alteration in office and the criticism that goes with it; market forces might create inequalities; and an egalitarian social order might deny liberties on the grounds they would interfere with equality. What the proper balance should be has, to be sure, eluded all of us. No doubt those who promote the reverse sequence would argue there is so little equality of condition that American society could stand for a great deal more before it becomes unbalanced. No doubt others will say that the pendulum has swung too far toward seeking equal conditions. I believe that the reverse sequence, by making civil liberties hostage to prior conditions, will weaken liberty without achieving equality.

To see why this is so—why equal conditions drive out equal rights rather than fully achieve them, as is commonly asserted—consider the coercive qualities required to maintain the reverse sequence. How can it be guaranteed that no citizen or group will acquire an unfair (in contemporary discourse, read “unequal”) command over resources? Acknowledging that perfect equality of condition is unobtainable and may even be undesirable, attempting nevertheless to attain it justifies regulation of virtually every aspect of life that tends toward substantive inequality, i.e., most everything. So long as every deviation from equal conditions is regarded as unfair, undemocratic, and, therefore, illegitimate, governmental intervention in the interstices of social life is mandated. In so sweeping a conception of democracy, equality before the law, except for instantaneous votes at the moment of achieving equality of resources, is a fatal impediment.

A different view of democracy, not heard from much in recent times, is that people get together to find common grounds on which to secure the blessings of liberty. The initial sequence—the procedural rights they can agree on—matters mightily precisely because people do not agree on substantive ends. They expect to come in
with different degrees of interest and information; they expect to be unequal in some respects because they want to be taken as they are; and they think that established positions should give way only slowly, since this resistance to change will dampen their proclivity to do whatever they decide to do. By foreclosing the end, or, rather, by making the end of equal condition the only legitimate beginning of political life, there is no room for a democracy of learning what to prefer. There can only be a democracy of enforcing prior preferences. And that, ironically, renders civil liberties useless, because there are no preferences to be changed. The reverse sequence and the original sequence are antithetic to each other; if you have one, despite what the song says, you can't have the other.